IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 544 of 2007
With
SPECIAL CRIMINAL APPLICATION No. 545 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MR.P.SRINIVAS,S/O.VIJAYKUMAR, (M.D) - Applicant(s)
Versus
M/S.GUJARAT POLY AVX ELECTRONICS LTD,THROUGH & 1 - Respondent(s)

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Appearance :
MR PM DAVE for Applicant(s) : 1,
MR HASMUKH N SHAH for Respondent(s) : 1,
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 17/07/2007

COMMON ORAL JUDGMENT

1. As in both these petitions common question of law and facts arise and are arising out of the

one complaint, they are being disposed of by this common judgment and order.

2. Both the aforesaid Special Criminal Applications are filed by the respective petitioners – original accused of Criminal Case No. 5552/05 to quash and set aside the common order dated 12.12.2006 passed by the learned trial Court rejecting the applications given below Exh.20 as well as Exh.28 and to quash and set aside the common judgment and order dated 15.2.2007 passed by the learned Sessions Judge, Gandhinagar in partly allowing the Criminal Misc. Application No. 4/2007 and dismissing the Criminal Misc. Application No.3/2007 and in not dismissing the complaint filed by the respondent No.1 herein against the petitioners.

3. That the respondent No.1 has filed a private complaint against the respective petitioners and other co-accused in the Court of learned Chief Judicial Magistrate, Gandhinagar being Criminal

Case No. 5552/2005 for the offence punishable under section 138 r.w. section 141 of the Negotiable Instrument Act; 1881 (hereinafter referred to as “the Act” for short) alleging inter alia that the petitioner company had issued three cheques viz. cheque bearing No.642838 dated 7.5.2005 for Rs.1,27,252/-, cheque bearing No.640109 dated 22.4.2005 for Rs.1,28,998/- and cheque bearing No.640139 dated 27.4.2005 for Rs.1,28,488/-. It is the case in the complaint that on presentation of the aforesaid cheques by the respondent No.1 – original complainant with its banker, all the above cheques were dishonoured and thereafter, after issuance of the statutory notice as required under the Act within the stipulated time, the respondent No.1 – original complainant has filed the aforesaid complaint, which is registered as Criminal Case No. 5552 of 2005 pending in the Court of learned Chief Judicial Magistrate, Gandhinagar. It is the case on behalf of the respective petitioners that after the learned Chief Judicial Magistrate,

Gandhinagar issued the summons against the respective petitioners for the offence under section 138 of the Act, the petitioners came to know about the filing of the said complaint and immediately thereafter they have contacted advocate at Ahmedabad and one Shri R.A.Patel, advocate inquired into the matter and contacted Shri Chirag Bhatt, advocate for the complainant and shown their willingness to settle the matter. It is the case on behalf of the petitioners that thereafter the advocate for the complainant contacted conversant officer of the complainant and telephoned to Shri R.A.Patel, learned advocate appearing on behalf of the petitioners that the complainant is ready and willing to settle the matter and assured the advocate for the petitioners that after receiving the amount, the complaint will be withdrawn by the complainant. It is the case on behalf of the petitioners that after giving assurance, the petitioners issued demand draft in the name of the respondent No.1 towards full and final settlement of Rs.3,84,738/- dated

15.6.2006. It is the case on behalf of the petitioners that in fact, an assurance was given by the learned advocate appearing for the complainant that on receiving the demand draft, they will withdraw the complaint on the next date of hearing i.e. on 27.6.2006. It is also the case on behalf of the petitioners that after receiving the said demand draft, the complainant deposited the said demand draft in their account and the amount is credited, however, surprisingly, thereafter the complainant has refused to withdraw the complaint.

4. That thereafter the petitioners appeared through their advocate on 27.6.2006 and filed a purshis vide Exh. 11 declaring that the total amount of the cheque has already been paid by the petitioners. It is also the case on behalf of the respective petitioners that as the original-complainant did not withdraw the complaint the petitioners preferred Criminal Misc. Application No. 7479 of 2006 under Section 482 of Cr.P.C., before this Court to quash the complaint.

However the said application came to be withdrawn by the petitioners with a liberty to raise the issue before the Trial Court. It is the case on behalf of the respective petitioners that thereafter the petitioners submitted application vide Exh. 28 before the Trial Court to dismiss the complaint on 2.12.2006 on the ground that the petitioner company has already paid the amount and original-accused No.1 preferred an application below Exh. 20 and original-accused No. 2 to 5 preferred an application below Exh. 28 for dismissing the complaint. That the learned Trial Court rejected both the applications, Exh. 20 as well as Exh. 28 by passing a common order dated 12.12.2006. Being aggrieved and dissatisfied with the orders passed below Exh. 20 and Exh. 28 the respective petitioners preferred a Criminal Revision Applications No. 3/2007 and 4/2007 before the learned District & Sessions Judge, Gandhinagar, and the learned Sessions Judge, Gandhinagar dismissed the Criminal Revision Application No. 3 of 2007 and partly allowed the Criminal

Revision Application No. 4 of 2007 dismissing the complaint against Smt. S.B. Rathamala, Director; Shri Siddharam Reddy (Purchase Incharge) and Shri ST Shrinivas Rao (Account Incharge) vide order dated 15.2.2007. Being aggrieved and dissatisfied with the judgment and order dated 15.2.2007 passed by the learned Sessions Judge, Gandhinagar, in Criminal Revision Applications No. 3 of 2007 and 4 of 2007 in not dismissing the complaint qua the petitioners, the petitioners have preferred the present petitions under Article 227 of the Constitution of India.

5. Shri KB Anandjiwala, learned advocate appearing on behalf of the petitioners has submitted that when the petitioners have paid the entire amount under the cheque in question relying upon the statement of the learned advocate appearing on behalf of the original-complainant that on deposit of the aforesaid amount the complaint to be withdrawn, it is not proper on the part of the original-complainant not to withdraw the

complaint. It is further submitted by him that not only that but even the original-complainant withdrew the amount deposited by the petitioners and the company. Shri Anandjiwala, learned advocate appearing on behalf of the respective petitioners has relied upon the affidavit of one Shri Ramesh A. Patel, Advocate who appeared on behalf of the petitioners before the Trial Court and has submitted that the petitioners deposited/paid the amount under the cheque in question on the assurance given by the learned advocate appearing on behalf of the original-complainant that on depositing the amount the complaint will be withdrawn and he will persuade the company to withdraw the complaint. Therefore it is submitted that when the learned advocate has filed the affidavit it should be believed and as the original-complainant has not withdrawn the complaint and when the entire amount has been deposited/paid by the petitioners – original-accused it is requested to quash and set aside the impugned complaint in exercise of powers under Section 482 of the

Cr.P.C. It is further submitted that once the assurance was given and the amount was deposited by the accused which is subsequently withdrawn, to continue the criminal proceedings for the offences under Section 138 of The Negotiable Instruments Act would be abuse of process of law and therefore it is requested to exercise the powers under Section 482 of the Cr.P.C.

6. On the other hand both these petitions are opposed by the learned advocate appearing on behalf of the original-complainant. It is submitted that no such assurance was given by the learned advocate appearing on behalf of the original-complainant as alleged to the effect that if the amount is deposited/paid by the original-accused the complaint will be withdrawn. The learned advocate appearing on behalf of the respondent, original-complainant has also relied upon the affidavit of advocate Shri Chirag Bhatt dated 7.5.2007, i.e., the Advocate who appeared on behalf of the original-complainant before the Trial Court whereby the

learned advocate appearing on behalf of the original-complainant has specifically denied having given any such assurance as alleged to the effect that he has informed the learned advocate appearing on behalf of the accused that if the amount is paid the complaint will be withdrawn. It is submitted that having realised that they have committed the offence under Section 138 of The Negotiable Instruments Act and they will be punished the accused have voluntarily deposited the amount under the cheque in question and merely because on deposit of the said amount the complainant has withdrawn the said amount the complaint is not required to be quashed. Learned Advocate appearing on behalf of the respondent original-complainant has relied upon the decision of the Hon'ble Supreme Court in the case of ***Rajneesh Agrawal Vs. Amit J. Bhalla,*** reported in ***AIR 2001 S.C. Page 518*** in support of his submission that as held by the Hon'ble Supreme Court, deposit by accused drawer of entire amount covered by cheque during trial does not absolve the accused

drawer of the liability of offence. Therefore it is submitted that merely because the petitioners – original-accused have deposited the amount covered by the cheque during the trial the complaint is not required to be quashed and set aside. It is submitted that both the Courts below have rightly refused to discharge the petitioners. It is therefore requested to dismiss both the Special Criminal Applications.

7. Heard the learned advocates appearing on behalf of the respective parties. Now the only contention raised by the learned counsel appearing on behalf of the petitioners, original-accused is that as the original-accused have deposited/paid the entire amount covered by the cheque on the assurance given by the learned advocate appearing on behalf of the original-complainant that on such deposit the complaint to be withdrawn by the original-complainant and therefore the impugned complaint is required to be quashed and set aside and both the Courts

have materially erred in not dismissing the complaint against the petitioners. The learned advocate appearing on behalf of the petitioners has heavily relied upon the affidavit of one Advocate Shri Ramesh A. Patel who appeared on behalf of the petitioners before the trial Court. On the other hand, it is the case on behalf of the respondent – original-complainant that there was no such assurance given either by the complainant and/or by their Advocate that on such deposit the complaint to be withdrawn and for that purpose the respondent, original-complainant has relied upon the affidavit of one Shri Chirag Bhatt, learned advocate appearing on behalf of the complainant before the Trial Court denying having given such an assurance. Thus, there is a word against word and it is disputed question of fact whether such an assurance was given or not. Under the circumstances, the impugned complaint cannot be quashed without leading any proper evidence. Now the contention on behalf of the petitioners that as the entire amount covered under the cheque is paid and

withdrawn by the original-complainant the complaint is required to be dismissed cannot be accepted considering the decision of the Hon'ble Supreme Court in the case of ***Rajneesh Agarwal (Supra)***. As held by the Hon'ble Supreme Court, deposit by the accused drawer of entire amount during trial does not absolve the accused drawer of the liability of the offence under Section 138 of The Negotiable Instruments Act and the deposit can have some effect on sentence to be awarded. Under the circumstances both the Courts below have not committed any error in not dismissing the complaint.

8. It is required to be noted that for the purpose of attracting the offence under Section 138 of The Negotiable Instruments Act what is required is whether the cheque in question is issued by the drawer; the same was presented; the same has been returned by the Bank either for insufficient fund and/or on some other ground; a statutory notice is given and within the stipulated time the amount is not paid; and

thereafter within the stipulated time the complaint is filed or not. Now, considering the facts of the present case and reading the complaint as a whole all the ingredients for the offences under Section 138 of The Negotiable Instruments Act are satisfied prima facie. Under the circumstances, a prima facie case for the offence under Section 138 of The Negotiable Instruments Act is made out. Therefore merely because the petitioners – original-accused have deposited the amount during the trial the petitioners are not absolved of the criminal liability under Section 138 of The Negotiable Instruments Act. As held by the Hon'ble Supreme Court in the case of *Rajneesh Agarwal (Supra),* the same can have some effect on sentence to be awarded. As stated above, the contention on behalf of the petitioners, that assurance was given by the learned advocate appearing on behalf of the original-complainant that on deposit of the amount covered under the cheque the complaint will be withdrawn, is disputed by the complainant and his advocate. The learned

advocate appearing on behalf of the petitioners before the Trial Court as well as the learned Advocate appearing on behalf of the complainant before the trial Court have filed cross-affidavits. Therefore at this stage on the said ground the complaint cannot be quashed. Under such circumstances both the Courts below have rightly refused to discharge the petitioners. Even otherwise, in a summons triable case there is no question of discharge by the trial Court.

9. For the reasons stated above, both the petitions deserve dismissal and accordingly both the petitions are dismissed. Rule is discharged. Ad-interim relief granted earlier stands vacated forthwith.

[M.R.Shah, J.]

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